No. 12513

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

O. E. HAMBLETON and
HARRIET ELIZABETH HAMBLETON,
his wife,

Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

J. CHARLES DENNIS
United States Attorney

VAUGHN E. EVANS
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OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
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INDEX

CASES CITED

CASES CITED *(Continued)*

STATUTES

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BRIEF OF APPELLANT

JURISDICTION

The jurisdiction of the United States District Court to try this case is set out in 28 U.S.C., Section 931 (Section 1346 of the revised edition of Title 28 U.S.C.), said section being commonly known as the Federal Tort Claims Act. The jurisdiction of this

court to review the decision of the District Court is set out in Title 28, U.S.C., Section 1291.

STATEMENT OF THE CASE

The plaintiffs' complaint alleges that on January 21, 1948, Sgt. William Anderson, an agent of the Criminal Investigation Division of the United States Army, interviewed the plaintiff, Mrs. Hambleton, at her home while Mr. Hambleton was absent from the city; that Sgt. Anderson was making an investigation in the course of his official duties; that he made statements and unreasonably and intentionally subjected Mrs. Hambleton to severe emotional distress in that he "grilled" her for a period of about three and one-half hours on matters about which she had no knowledge and stated to her that her husband was consorting with a redheaded woman, that he was under arrest on charges of grand larceny and drunk driving, and talked to her about getting a divorce from her husband. The complaint further alleges that as a result of this interview Mrs. Hambleton suffered a complete mental collapse and went insane for a period of over a month, requiring hospitalization and shock treatments to restore her sanity.

The defendant moved to dismiss the complaint for the reasons (1) that the alleged tort falls within

the exceptions of the Federal Tort Claims Act; and (2) that the complaint fails to state a cause of action against the United States of America. This motion was overruled.

The following is a summary of the evidence adduced at the trial. Sometime prior to January, 1948, the Criminal Investigation Division of the United States Army received reports that a certain Lt. Bennett stationed at Fort Lawton, Seattle, Washington, was demanding a "kick back" of a portion of the rewards granted by the Army to private detectives and other individuals who apprehended and returned soldiers who had deserted the Army. Sgt. William Anderson, an agent of the Criminal Investigation Division, was assigned the task of investigating the facts of the alleged misconduct of Lt. Bennett.

Anderson learned that a private detective, Mr. O. E. Hambleton, had returned several deserters to the Army authorities at Fort Lawton. Anderson decided to interview Mr. Hambleton to determine if any demands had been made upon him for "kick backs" on the rewards which he had received.

Upon learning that Mr. Hambleton was in Nevada, Anderson decided to interview Mrs. Hambleton. Anderson called Mrs. Hambleton on the telephone and after identifying himself, asked for an appoint-

ment which Mrs. Hambleton granted. The evidence is in sharp dispute as to when Anderson arrived at Mrs. Hambleton's home and when he left. The plaintiffs' evidence is that he arrived about 4:00 p. m. and left at about 8:00 p. m. on January 21, 1948, while the defendant's evidence is that he arrived about 5:45 p. m. and left about one and one-half hours later.

Mrs. Hambleton had had an operation for ulcers on November 14, 1947. But the evidence is in sharp dispute as to whether or not Anderson was aware of this fact prior to the interview.

The evidence as to what occurred during the interview is in sharp dispute. Since the plaintiff prevailed in the District Court, and it is the duty of a reviewing court to view the evidence of the prevailing party of the lower court in its most favorable light, this statement will be confined to the testimony revealed by the plaintiffs' testimony. When Anderson arrived, Mrs. Hambleton invited him in to her living room and asked him to be seated. Anderson showed her some credentials. Anderson first stated that he had some information which would be of some value to Mrs. Hambleton in obtaining a divorce from Mr. Hambleton, and that Mrs. Hambleton had some information which would be of value to Anderson. Anderson stated that Mr. Hambleton was being held

on a grand larceny charge in Nevada. Mrs. Hambleton stated that she was not interested in getting a divorce from Mr. Hambleton.

Anderson then started questioning Mrs. Hambleton as to whether she knew Lt. Bennett to which Mrs. Hambleton replied in the negative. Anderson kept insisting that Mrs. Hambleton must know Lt. Bennett and asked her the same questions over and over again. After some time Mrs. Hambleton recognized Lt. Bennett as being the same man she had known by the name of Crowthers (T. R. 56, 57).

Mrs. Hambleton complained that all during the interview, Anderson "grilled" her. Her testimony as to what actually happened and what she meant by "grilling" may be summarized as follows:

1. That Anderson was insulting in that he kept asking her the same questions over and over again, insinuating that she was not telling the truth (T. R. 44, 46, 47, 50, 51).

2. That Anderson stated or inferred that Mr. Hambleton had left town with a redheaded woman. All of which Mrs. Hambleton contends was untrue (T.R. 43, 44).

3. That Anderson insulted Mrs. Hambleton by

insinuating that her ulcers were caused by excessive drinking which was not true (T.R. 46, 51).

4. That after Mr. Hambleton called Mrs. Hambleton by long distance from Nevada, while Anderson was present, asking Mrs. Hambleton to check on the collision insurance on their automobile, Anderson stated to Mrs. Hambleton that Mr. Hambleton needed the money for a bail bond, all of which Mrs. Hambleton claims was not true (T.R. 49).

On cross examination of the plaintiffs' principal witness, Mrs. Hambleton, the following facts were elicited:

1. That Mrs. Hambleton did not consider herself under arrest during the interview (T.R. 54).

2. That Anderson made no offer or threat of force or violence of any kind (T.R. 55).

3. That Anderson made no threats that he was going to arrest Mrs. Hambleton (T.R. 55).

4. That Mrs. Hambleton did not object to answering Anderson's questions (T.R. 55, 56, 57).

5. That Mrs. Hambleton was willing to carry on the conversation with Mr. Anderson (T.R. 57, 58).

6. That Mr. Hambleton had been drinking to

excess for sixteen years and Mrs. Hambleton did not like it (T. R. 62, 52).

7. That Mrs. Hambleton could have sued Mr. Hambleton for divorce many times but never had (T.R. 66).

8. That at the time of the interview, Mrs. Hambleton was worried about Mr. Hambleton's physical condition as the result of the accident in Navada (T.R. 52).

9. That after Mrs. Hambleton returned from the sanitarium and her sanity was restored, she remembered nothing of her past life but that gradually things have come come back to her upon suggestions from other people (T.R. 59, 60, 61).

There was no testimony whatever that anyone ever asked Mr. Anderson to leave the premises.

During the cross examination of Mrs. Hambleton, she stated that during the interview she received a telephone call from a former woman client of Mr. Hambleton who told her that she had told Anderson about Mrs. Hambleton's operation. When Mrs. Hambleton was asked to reveal the name of the former client, she refused on the ground of privilege and the trial judge ruled that the witness could not be compelled to tell the name of such former client of Mr.

Hambleton in his capacity as a private detective (T.R. 52, 53, 54).

There is no dispute as to the fact that on January 28, 1948, Mrs. Hambleton appeared at the office of Dr. Flaherty who had performed the ulcer operation, and that at that time she was in a state of psychosis. There is likewise no dispute that Mrs. Hambleton was thereafter treated at Crown Hill Sanitarium for approximately a month to restore her sanity.

Dr. Riley, the neuropsychiatrist who treated Mrs. Hambleton for her mental disorder, testified at length as to her mental breakdown (T.R. 66, 67). Dr. Riley further testified:

1. That medical science is not in a position to know exactly what causes a person to go into a psychosis (T.R. 68).

2. That it is possible the interview with Mr. Anderson caused the psychosis (T.R. 70, 81).

3. That only an expert trained in neuropsychiatry could tell if a person might or might not go into a psychosis (T.R. 71, 72).

4. That no one can tell how much mental stress

a given individual can stand before going into a psychosis (T.R. 73).

5. That he had never examined Dr. Flaherty's records nor made any investigation to try to determine what could have caused Mrs. Hambleton to go into the psychosis and did not know Dr. Flaherty had treated Mrs. Hambleton for a nervous condition on January 19, 1948 (T.R. 77, 78, 79, 80).

6. That the statements set out in his letter (Exhibit 1) to Dr. Flaherty were based on information received from Mr. Hambleton and Mrs. Raskin, and not from any personal knowledge of his own (T.R. 70).

Dr. Francis E. Flaherty was Mrs. Hambleton's family physician and performed the operation on November 14, 1947. The doctor stated that Mrs. Hambleton had advised him on one or two occasions that she was nervous about her family problems or trouble with her husband (T.R. 31); and that she had indicated to him that Mr. Hambleton's use of alcohol had caused her some anxiety and nervousness (T.R. 32). On December 31, 1947, Mrs. Hambleton called upon Dr. Flaherty for a checkup as the result of her operation and at that time the doctor learned that her husband had gone on occasional bouts of drinking and that this had concerned her somewhat

(T.R. 35). On January 19, 1948, Mrs. Hambleton again called on Dr. Flaherty and at that time she was quite nervous having just received word that her husband had been involved in an automobile accident in Nevada and that his condition was critical. At that time Dr. Flaherty prescribed a sedative (T.R. 36) for Mrs. Hambleton. Dr. Flaherty did not again see or hear from Mrs. Hambleton until January 28, 1948.

The defendant introduced into evidence that portion of Sgt. Anderson's official report which covered his interview with Mrs. Hambleton (Exhibit A-6). This report was prepared and submitted on January 27, 1948. The defendant also introduced War Department Circulars and War Department Manuals showing the discretion vested in investigating agents in the performance of their duties.

The trial judge in his oral decision and written Findings of Fact found that the defendant's agent, Anderson, interrogated Mrs. Hambleton for approximately three and one-half hours and in so doing failed to use reasonably prudent methods and due care in conducting such investigation and that he grilled her excessively for an excessive length of time and on delicately personal subjects not directly connected with the investigation he was conducting and

generally used emotionally distressing methods which were likely to injure her body or mind or endanger her health (T.R. 15). The trial judge awarded the plaintiff $5,000.00 general damages and $552.52 special damages.

QUESTIONS RAISED

1. Does the plaintiffs' amended complaint state a cause of action under the laws of the State of Washington?

2. Do the Findings of Fact describe a tort for which the laws of the State of Washington would grant relief.

3. Is there sufficient evidence to support the court's finding that Agent Anderson grilled Mrs. Hambleton and used emotionally distressing methods which were likely to injure her body and mind or endanger her health.

4. Is there any evidence to support the court's finding that the conduct of Agent Anderson was unlawful.

5. Is there any evidence upon which the trial judge could find that Agent Anderson's conduct was the proximate cause of Mrs. Hambleton's injuries?

6. Is the plaintiff's complaint a cause of action

arising out of assault, misrepresentation or deceit?

7. Is the plaintiff's cause of action based upon the abuse of discretion on the part of Agent Anderson while exercising discretionary functions as authorized by the Department of the Army?

8. Is the relationship of a private detective and his client such that it would be improper for the trial judge to compel a private detective's wife to reveal the name of such client?

SPECIFICATIONS OF ERROR

1. The court erred in overruling the defendant's motion to dismiss the plaintiffs' complaint.

2. The court erred in finding from the evidence that a tort was committed for which relief would be granted under the laws of the State of Washington.

3. The court erred in finding that the conduct of Anderson was the proximate cause of the plaintiff's injuries.

4. The court erred in finding that the plaintiff's cause of action does not fall within the exceptions to the Federal Tort Claims Act.

5. The court erred in ruling that the witness, Harriet Hambleton was privileged not to reveal the name of a person with whom she had a telephone

conversation for the reason that the said person was a former client of her husband in his business as a private detective.

Argument On Specifications of Error 1 and 2

SUMMARY

The Federal Tort Claims Act allows recovery only in cases where the laws of the state in which the act or omission occurred, would allow recovery. The plaintiff seeks recovery for mental distress unaccompanied by any invasion of her person or property. The law of the State of Washington does not allow recovery in such cases.

ARGUMENT

Under the Federal Tort Claims Act as it existed at the time plaintiffs' complaint was filed the United States is liable for torts under "circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred." The revision of Title 28, effective September 1, 1948 contains similar language.

It is the defendant's contention that neither the complaint nor the evidence adduced at the trial de-

scribes a tort for which relief would be granted under the laws of the State of Washington. Since both the first and second specifications of error deal with the same points of law, the two specifications will be argued together herein.

The plaintiffs' complaint and the evidence adduced at the trial show clearly that if the plaintiff suffered any injuries caused by the defendant's agent, Anderson, the same was caused by words alone unaccompanied by any invasion of the plaintiffs' person or property. . .

As will be shown herein the laws of the State of Washington as decided by the Supreme Court of that state do not allow recovery under such circumstances.

Barnes v. Bickle, 111 Wash. 133. The facts in this case are very similar to the facts alleged in the plaintiffs' case herein. In the Barnes case the plaintiff was renting a rooming house on a month to month tenancy from the defendant. The plaintiff had paid her rent for the month of July. On July 20, the plaintiff went to a hospital for an operation. The plaintiff left the rooming house in charge of a maid. On July 24, the maid became ill and invited the defendant to assume charge of the rooming house. The defendant notified several of the plaintiffs' roomers

that the defendant intended to remain in charge and that all rents were to be paid to the defendant. This fact was reported to the plaintiff in the hospital.

On July 26, the defendant sent a notice to the plaintiff's nurse at the hospital to the effect that on August 1, the rent would be increased from $150.00 to $300.00 per month, and requested that the note be delivered to the plaintiff if she was able to receive it. The notice was delivered to the plaintiff in the hospital. On August 1, the plaintiff tendered $150.00 rent which the defendant at first refused but later accepted. On August 6, a notice of termination of the tenancy was served upon the plaintiff to be effective on September 1. The plaintiff suffered great mental anguish and her recovery was retarded, and now seeks to recover for physical and mental pain, distress and suffering.

The Supreme Court of the State of Washington denied plaintiff's recovery stating that it was apparent from the allegation in the complaint and proof in support thereof, that there was no physical invasion of the plaintiff's person. The court then went on to state:

> "And since there was no physical invasion of the respondent's person, her sole claim must necessarily be, as it no doubt is, made in the com-

> plaint for physical and mental distress where there was no act amounting to an assault."

The decision states further "* * * there can be no recovery for mental and physical distress where there was no invasion of the person or property of the claimant."

Stiles v. Pantages Theater Company, 152 Wash. 626. This decision cites and affirms the decision in *Barnes v. Bickle, supra*, as still being the law of the State of Washington. In the Stiles case the plaintiff, a seventeen-year-old girl, entered an amateur movie contest wherein the winner was to receive a trip to Hollywood. The plaintiff was the winner in the preliminary tryout and was scheduled to appear in the defendant's theater in the final contest. The manager of the defendant's theater informed the plaintiff he would not permit her to enter the final contest. The plaintiff went to the theater at the time of the final contest and attempted to prepare herself to go on the stage with the other contestants. The manager of the theater came back-stage and refused to allow the plaintiff to enter the contest. In so doing, the manager shook his fist in the plaintiff's face, swore at her and told her to get out of the theater. The plaintiff sought to recover for the resulting mental suffering caused by the acts of the theater manager.

In denying the plaintiff's right to recover the Supreme Court of the State of Washington stated in its decision:

> "It seems clear to us, in the light of our prior holdings, that mere mental suffering resulting from the act of another which is not willful, in the sense of being malicious, such act being unaccompanied by physical injury caused at the same time, is not ground for recovery of damages. The law upon this subject has been reviewed in a number of our decisions and announced in substance as thus stated. See, *Corcoran v. Postal Telegraph-Cable Co.*, 80 Wash. 570, 142 Pac. 29, L.R.A. 1915B 522; *Kneass v. Cremation Society*, 103 Wash. 521, 175 Pac. 172, 10 A.L.R. 442; *Barnes v. Bickle*, 111 Wash. 133, 189 Pac. 998; *Gadbury v. Bleitz*, 133 Wash. 134, 233 Pac. 299."

Lewis v. Physicians Credit Bureau, 27 Wash. (2d) 267, decided in 1947. In this case the Supreme Court of the State of Washington again affirms the case of *Barnes v. Bickle, supra.* In the Lewis case, plaintiff seeks to recover for mental distress caused by an invasion of the plaintiff's right of privacy. The defendant called the office of the plaintiff's wife's employer on the telephone and informed the employer that the plaintiff owed a bill which he had refused to pay, and that the defendant would institute proceedings to garnishee the wages of the plaintiff's wife. The Supreme Court of the State of Washington after denying that the complaint constituted a

violation of the plaintiff's right of privacy, if any such existed, quoted that portion of the *Stiles v. Pantages Theater* case as heretofore quoted. A recent search indicates that there have been no further decisions dealing with this subject since the Lewis case.

Corcoran v. Postal Telegraph-Cable Company, 80 Wash. 570. In this case, the plaintiff's wife dispatched a telegram to the plaintiff who was then in St. Paul, Minnesota, stating that the plaintiff's baby was very low. Due to negligence on the part of an employee of the defendant telegraph company, the message was not delivered. The baby died and was buried before the father even knew that the baby was ill. The plaintiffs sought recovery for their mental suffering. The trial court allowed recovery and the Supreme Court of the State of Washington reversed the trial court.

The opinion in this case contains an exhaustive review of cases decided both in the State of Washington and other jurisdictions touching upon the subject of recovery for mental suffering where physical injury is not involved. In reviewing the cases decided in the State of Washington, the opinion states:

> "Are we correct in assuming that this court has not, in any of its decisions, expressed views at variance with the common law rule as understood and applied by the great majority of the courts

as above indicated? Let us notice our own decisions relied upon by counsel for respondents. In *Willson v. Northern Pac. R. Co.*, 5 Wash. 621, 32 Pac. 468, 34 Pac. 146, damages were claimed for injury to feelings and mental suffering flowing from the expulsion of a passenger from a car, unaccompanied by physical force or violence. Damages were allowed in that case to the passenger, but upon the theory that the act complained of was willful and was accompanied by duress. There was in law a physical wrong committed against the person. In *Gray v. Washington Water Power Co.* 30 Wash. 665, 71 Pac. 206, the plaintiff was awarded compensation for mental suffering on account of personal disfigurement resulting from a physical injury caused by the defendant. Manifestly, the mental suffering was inseparable from the physical. This is an example of one of the most common class of cases wherein mental suffering enters into the measurement of damages. In *Davis v. Tacoma R. & Power Co.*, 35 Wash. 203, 77 Pac. 209, 66 L.R.A. 802, damages were allowed the plaintiff because of the defendant's willful expulsion of her from a public park where she had a right to be. Here, again, is an example of a willful wrong accompanied by duress. In *Ott v. Press Publishing Co.*, 40 Wash. 308, 82 Pac. 403, damages were claimed by plaintiff because of his mental suffering flowing from the publishing of a libel against him. This, also, was a willful wrong, the libelous words being actionable *per se*, and tending to degrade and work financial loss to the plaintiff. In *McClure v. Campbell*, 42 Wash. 252, 84, Pac. 825, damages were allowed the plaintiff for mental suffering flowing from his wrongful eviction from premises. Here, again, the action was willful and accompanied by duress. In *Nordgren v. Lawrence*, 74 Wash. 305, 133 Pac. 436,

damages were allowed for mental suffering flowing from a wrongful entry upon the plaintiff's premises, though no physical injury was inflicted upon her, but this also was a willful wrong, inflicted upon the plaintiff by the invasion of the sacred precincts of her home. The wrongful act was a physical invasion of the plaintiff's personal rights. In *Wright v. Beardsley*, 46 Wash. 16, 89 Pac. 172, the plaintiffs were allowed damages for mental suffering unaccompanied by physical injury, flowing from the wrongful and improper burial of their infant child by the defendant. This decision we regard as the extreme proper application of the rules of law allowing damages for mental suffering alone, and we are constrained not to extend the doctrine beyond the application of the particular facts there involved. The acts were regarded by the court as willful, and the wrong consisted in the violation of the rights of the parents to have decent interment for their infant child. It was also a physical invasion of the plaintiff's rights."

In further considering the question, the Supreme Court stated in its opinion on Page 585:

"To attempt to fix a monetary value as damages for such suffering would be to enter the realm of speculation, as much today as it would have been fifty or a hundred years ago. The only possible ground upon which such damages could be allowed would be the ground upon which punitive damages are allowed. This thought is expressed in some degree in some of the decisions we have noticed, but it is worthy of note in this connection that punitive damages are not recoverable in this state even when the injury upon which the claim is rested flows from gross negligence or willful wrong, except when expressly allowed by statute."

It is thus clear that under the laws of the State of Washington there can be no recovery unless the mental suffering is accompanied by physical injuries caused at the time. It is elementary that a person cannot recover merely because damages have been suffered. It must be remembered that before damages can be recovered, there must first be a tort. Under the laws of the State of Washington no tort was committed by the defendant's agent, Anderson.

The only possible torts which by the farthest stretch of the imagination the plaintiffs' evidence might support are slander or assault. Slander, of course, is one of the torts specifically excluded in the Federal Tort Claim Act. Assault is likewise excluded. The decisions of the Supreme Court of the State of Washington clearly hold that unless there has been an assault, which is another way of saying injury to the person or property of the plaintiff, there can be no recovery. The plaintiff here seeks to recover on some nameless tort which is neither an assault nor slander, claiming damages for mental suffering as a result thereof. The very cogent reasons why the decisions of the Supreme Court of the State of Washington have not allowed recovery in such cases is clearly stated in the last quotation from the case of *Corcoran v. Postal Telegraph-Cable Company, supra,*

to the effect that allowing a monetary recovery for such damages enters into the realm of speculation and are not subject to being proven. It must be conceded that the testimony of the neuropsychiatrist in the case at hand indicates that medical science has still not advanced to the point where such damages and the causes thereof can be proven. The most that Dr. Riley could state is that the interview conducted by Agent Anderson could *possibly* have caused the injury.

MOTION TO DISMISS COMPLAINT

The decision of the lower court in overruling the defendant's motion to dismiss the complaint is set out on page 4 of the transcript of the record. The trial judge quoted from *Johnson v. United States* that portion which states in effect that Congress sought to relieve itself of the burden of granting relief for torts committed by employees of the Government. The trial judge had just recently been reversed by this court in that decision. The defendant has no quarrel with the language used in the Johnson decision, nor with the Tort Claims Act as passed by Congress. However, defendant does not believe that the Federal Tort Claims Act or any decision dealing with such Act has held that Congress delegated to the judicial branch of the Government the authority to grant gratuitous

relief to persons who had been injured. The Tort Claims Act and the decisions dealing with that Act confine the authority of the courts to spend the taxpayers' money in cases where the United States, if an individual, would be liable under the laws of the place where the act or omission occurred.

Argument On Specification of Error No. 3

SUMMARY

There was nothing to indicate to Agent Anderson that his interview would cause the plaintiff any injury. Only a trained neuropsychiatrist could tell if a person might or might not go insane from questioning. The laws of Washington allow recovery only where the defendant could foresee some danger to the plaintiff because of the defendant's acts. There is no evidence showing the interview was the proximate cause of the plaintiff's injury.

ARGUMENT

It is the defendant's contention that the court erred in finding that the conduct of Agent Anderson was the proximate cause of the plaintiff's injuries. It is the defendant's contention that a plaintiff can recover only when a tort has been committed. A tort is committed only when a person does an act or omits doing an act when a person of ordinary prudence

would have done otherwise. The decision of the Supreme Court of the State of Washington in *Severns Motor Company v. Hamilton*, 135 Wash. Dec. 571, decided February 3, 1950, supported this contention in the following language quoted from page 572 of the decision:

> "A person is negligent if he does an act which a person of ordinary prudence would not have done under the existing circumstances. It is not the result of the act that is controlling, nor is the conduct to be judged by what, after injury has occurred, then appears would have been a proper precaution. The question of negligence must be determined by what would or should have reasonably been anticipated or foreseen in the exercise of ordinary prudence as likely to happen. *Burr v. Clark*, 30 Wn. (2d) 149, 190 P. (2d) 769; 1 Shearman and Redfield on Negligence (1941 ed.) 50, Sec. 24."

In the case at hand, Dr. Riley, the neuropsychiatrist called by the plaintiff, stated that only an expert would be capable of determining whether or not an individual might or might not suffer any mental illness as a result of an interview (T.R. 71, 72) and stated further:

> "Q. In other words, a common ordinary investigator going out to talk to someone, there would be nothing that would be a red flag in front of his face that this person might go insane?
>
> A. That is right."

In *Burr v. Clark*, 30 Wn. (2d) 149, the Supreme Court of the State of Washington defined due care in the following language:

> "The duty to use care is based upon the knowledge of danger, and the care which must be used in any particular situation is in proportion to the actor's knowledge, actual or imputed, of the danger to another in the act to be performed. 38 Am. Jur. 678, Negligence, Sec. 32; 45 C. J. 651, 653, Negligence, Sec. 25, 27.
>
> Ordinary or reasonable care is, as frequently expressed, that care which an ordinarily reasonable and prudent person would exercise under the same or similar circumstances. *Berglund v. Spokane County*, 4 Wn. (2d) 309, 103 P. (2d) 355; *Olsen v. John Hamrick's Tacoma Theatres*, 9 Wn. (2d) 380, 115 P. (2d) 718, and cases therein respectively cited.
>
> In *Ullrich v. Columbia & Cowlitz R. Co.*, 189 Wash. 668, 66 P. (2d) 853, we defined negligence and prescribed the standard for its determination by quoting with approval the following statements found in 45 C.J. 632, 660, Negligence, Secs. 2, 27:
>
> 'A Judicial definition bringing out with admirable conciseness the elements of actionable negligence is as follows: "Negligence is an unintentional breach of a legal duty causing damage reasonably foreseeable without which breach the damage would not have occurred".'
>
> 'The actual result of an act or omission is not controlling in determining whether or not it was negligent, nor is the duty of the person doing or omitting an act to be estimated by what, after an injury has occurred, then first appears to be a proper precaution, but the question of negli-

gence must be determined according to what should reasonably have been anticipated, in the exercise of ordinary prudence, as likely to happen.'

The rule as stated in the last-quoted paragraph was applied in *Banks v. Seattle School Dist. No. 1*, 195 Wash. 321, 80 P. (2d) 835."

Further assistance on this subject is found in *Emery v. Littlejohn*, 83 Wash. 334.

"One is not liable for his every act that may ultimately result in wrong to another. He is only responsible for that which, in the light of experience of mankind, he should reasonably anticipate as liable to happen; not that which might barely possibly happen as the result of his act. In the text of Webb's Pollock on Torts (enlarged Am. ed.), on page 42, the learned author observes:

'The doctrine of "natural and probable consequence" is most clearly illustrated, however, in the law of negligence. For there the substance of the wrong itself is failure to act with due foresight; it has been defined as "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." Now a reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behaviour we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety

on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things. This being the standard, it follows that if in a particular case (not being within certain special and more stringent rules) the harm complained of is not such as a reasonable man in the defendant's place should have foreseen as likely to happen, there is no wrong and no liability.'

Similar observations are made in the text of Negligence of Imposed Duties (Personal), p. 133 by the learned author, Justice Ray, as follows: 'Mischief which could by no reasonable possibility have been foreseen, and which no reasonable person would have anticipated, cannot be taken into account as a basis upon which to predicate a wrong. A reasonable man does not consult his imagination, but can be guided only by a reasonable estimate of probabilities. The reasonable man, then, to whose ideal behaviour we are to look as the standard of duty, will neither neglect what his reason and experience will enable him to forecast as probable, nor conduct, on a basis of bare chances, a business whose success is dependent upon his accuracy in forecasting the future. He will order his precaution by the measure of what appears likely in the usual course of things.

The proper inquiry is not whether the accident might have been avoided if the one charged with negligence had anticipated its occurrence, but whether, taking the circumstances as they then existed, he was negligent in failing to anticipate and provide against the occurrence. The duty imposed does not require the use of every possible precaution to avoid injury to individuals, nor of any particular means which it may appear, after the accident, would have avoided it.

> The requirement is only to use such reasonable precautions to prevent accidents as would have been adopted by prudent persons prior to the accident'."

It is difficult therefore, to see how Agent Anderson could have reasonably anticipated or foreseen in the exercise of ordinary prudence that his interview with Mrs. Hambleton would cause her any injury whatsoever. If such were the law, it is doubtful if any law-enforcement officer could ever perform his duties without rendering himself liable for mental suffering by individuals with whom he had an interview. There is scarcely a citizen, law-abiding or otherwise, who does not have some emotional distress or emotional disturbance when a law-enforcement officer calls upon them for an interview. It is the defendant's contention that under the Washington State law, so long as a Government investigator uses no threats of force or violence, or any threats of arrest, there can be no liability against such Government agent or his principal because of the words which he uses.

Viewing the plaintiff's evidence in its most favorable light, it shows that the only possible misconduct on the part of Agent Anderson is that he was insulting in asking the same questions over and over again, insinuating that Mrs. Hambleton was not telling the

truth; that Anderson insinuated that Mrs. Hambleton's ulcers were caused by excessive drinking; that he stated Mr. Hambleton had left town with a red-headed woman; and that Mr. Hambleton was being held on a charge of grand larceny and needed money for bail bond. The plaintiff contends that these acts constitute "grilling." The defendant contends that the term "grilling" implies questioning under threat of violence or bodily harm.

It should be pointed out that the plaintiff's witness under cross-examination admitted that Mrs. Hambleton did not consider herself under arrest during the interview; that Anderson made no threat that he was going to arrest Mrs. Hambleton; that Anderson made no threat of force or violence of any kind; that Mrs. Hambleton did not object to answering Mr. Anderson's questions; that Mrs. Hambleton was willing to carry on the conversation with Mr. Anderson; that Mr. Hambleton had been drinking to excess for 16 years and that Mrs. Hambleton did not like it; that Mrs. Hambleton could have sued for divorce from Mr. Hambleton many times but never did; and that at the time of the interview she was worried about Mr. Hambleton's physical condition as a result of the accident in Nevada.

Under these circumstances, it is the defendant's

contention herein that Agent Anderson had no knowledge that his actions were causing any danger to Mrs. Hambleton whatever. He committed no acts from which he could ever suspect that he was causing Mrs. Hambleton any harm whatever.

The defendant further contends that there is no causal connection between the interview and Mrs. Hambleton's later mental collapse. The evidence clearly shows that Mrs. Hambleton had been under a nervous strain for some time. Her family physician knew that Mr. Hambleton had been drinking and that Mrs. Hambleton was upset about it. Just two days before the interview, Mrs. Hambleton was in her family physician's office in such a nervous state that it was necessary for Dr. Flaherty to prescribe a sedative. There is no medical testimony of any kind which would indicate that Mrs. Hambleton would not have suffered her mental collapse were it not for the interview. The most that the neuropsychiatrist would say is that the interview could *possibly* have caused the mental collapse. The burden of proof being upon the plaintiff, how then could the trial judge make a finding of fact that the interview caused the plaintiff's injury under such evidence? The defendant contends that the trial judge should have dismissed the plaintiff's cause for failure to sustain this burden of proof.

Argument On Specification of Error No. 4

SUMMARY

The Tort Claims Act specifically excepts from its operation all claims arising out of assault, misrepresentation and deceit and also all claims arising out of an abuse of discretion. Under the laws of the State of Washington the plaintiff cannot recover unless his action is based on assault, misrepresentation or deceit. The duties and required qualifications of an agent in the C.I.D. of necessity require him to use his discretion.

ARGUMENT

It is the defendant's contention that the plaintiff's cause of action is either based upon assault, misrepresentation and deceit, or upon abuse of discretion on the part of a Government agent.

Section 2680, Title 28, U.S.C., Subdivision (h), specifically excludes from the operation of the Federal Tort Claims Act, any claim arising out of assault, misrepresentation, or deceit. All during the trial, the plaintiffs have specifically denied that this action is based upon assault, misrepresentation, or deceit. As has been heretofore shown, unless one of these torts was committed by the Government agent so as to satisfy the requirement of an invasion of the

plaintiffs' person or property, that the laws of the State of Washington will not allow recovery. The plaintiff, then, is in the embarrassing position of having to prove a case based upon assault, misrepresentation or deceit in order to recover under the laws of the State of Washington, and at the same time contend that his case does not fall within those categories in order to escape the exception in the Federal Tort Claims Act. It is the Government's contention that this cannot be done.

Subparagraph (a) of Section 2680, Title 28, U.S.C., states in effect that the Government shall not be liable in cases where the cause of action is based upon the abuse of discretion on the part of the employee of the United States while exercising a discretionary function. That subsection is quoted as follows:

> "Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

It is the defendant's contention that the very nature of Agent Anderson's duties and the required qualifications for one acting in his capacity clearly

show that he was vested with a great amount of discretion in the course of his official duties.

The defendant introduced in evidence, War Department Circular 276 as Exhibit A-5, beginning on page 102 of the Transcript of Record. This circular sets out the criminal investigation program, its responsibilities and procedure. As stated in paragraph 3 (h) and (i) of that circular, agents of the Criminal Investigation Division are authorized to wear civilian clothes and use civilian-type automobiles in their investigations. In paragraph 4 of that War Department circular it clearly shows that the personnel selected for this type of duty shall be those who have the necessary mental qualifications to properly exercise discretion. As stated in that paragraph 4, special emphasis shall be placed upon "good character, dependability, and above average intelligence." In paragraph 5 of the War Department circular under "Duties", it will be seen that among other things the criminal investigators are charged with the collection and investigation of all evidence of crime effecting the Army. Under paragraph 10 of the circular it will be seen that investigators will carry identification which will be honored at all times and in all places irrespective of their rank, and further that they shall not be called by their military rank

but as "agent" or "mister". Subparagraph (d) of paragraph 10 further provides that agents shall have complete freedom of movement in the performance of their duties.

There was further introduced into evidence in the trial, Exhibit A-3 which is War Department Field Manual 19-20, the original of which has been filed with the Clerk of the Court of Appeals. On page 4 under subparagraphs (b) and (c) of paragraph 8, the following will be found:

> "b. Criminal investigators usually operate singly or in small groups under directives which authorize considerable latitude in investigative procedure."
>
> "c. Criminal investigators should be given special authority to go wherever necessary to complete their investigations. They should be furnished with identification cards, badges, special passes, and other credentials to permit them to carry on their work without interference, and with minimum restrictions upon their movements."

On page 21 of Exhibit A-3, the following will be found under the paragraph entitled "Objectives of an Interview":

> "a. Investigators must interview every available witness to a crime or its circumstances. Since the trial judge advocate determines which witnesses will be called to testify for the prosecution at the trial and to what circumstances they will testify, the investigative report must

furnish him complete information relative to the results of the interviews of witnesses."

Counsel for the parties entered into a stipuation as to what Col. Carol V. Cadwell, Provost Marshal for the Sixth Army, would have testified to if he were called as a witness. This stipulation is Exhibit A-7 printed on pages 115 through 117 of the transcript of the record. Particular attention is invited to paragraph 7 of the stipulation wherein it is stated that Criminal Investigation Division agents have a wide discretion as to the manner in which they perform their duties.

The above evidence is not disputed anywhere in this case. It is the defendant's contention that Agent Anderson was performing a discretionary function during his interview with Mrs. Hambleton. The very nature of his duties certainly indicate that unless he was vested with wide discretion in the performance thereof, he could never accomplish those duties. Obviously, it would be impossible to carry on an interview with a witness in any prescribed manner. Of necessity, an investigating agent must ask such questions of a prospective witness as will elicit the information needed by the prosecuting authorities. It is difficult to imagine a duty which would require more discretion than that of an investigator.

Not only does the Tort Claims Act specifically except from the operation thereof, claims arising out of abuse of discretion, but also the decisions of the Supreme Court of the State of Washington have taken that view with regard to public officials. In *Emery v. Littlejohn*, 83 Wash. 334, the Supreme Court of the State of Washington announced its views on that subject in the following language:

> "The acts of Dr. Calhoun here complained of being official, and calling for the exercise of his discretion, the law seems to be settled beyond controversy that he cannot be called to account for any consequences flowing therefrom, in a civil action for damages instituted by a person claiming to be injured as the result of such discretionary action, in the absence of malicious or corrupt action. It is not claimed that Dr. Calhoun acted either maliciously or corruptly. Indeed, it could not be with any show of reason under the evidence. The most that can be said is that he acted mistakenly, or for argument's sake, we may concede that he acted negligently; but, under all the authorities, such action would not render him liable in this action, since his acts were official and involved his discretion. In the text of 29 Cyc. 1444, after noticing the law touching the immunity of judicial and legislative officers from liability in an action for damages flowing from their official acts, it is said:
>
> 'In the third place are the vast number of officers not holding courts, but discharging executive and administrative functions, whose discharge involves the exercise of judgment and discretion. Such officers are not liable for a mistaken exercise of such discretion. In many

of the cases on the liability of inferior judicial officers and officers discharging quasi-judicial or administrative functions, the opinions would seem to lay stress upon the absence of malice or corrupt intent as an important element in the determination of the immunity from liability. But in most cases what is said in the opinion is merely *dictum*, inasmuch as the actual decision did not recognize the liability. There are, however, a few cases which actually decide that if the act complained of has been done with corrupt motives or malice there is a liability to the person injured. On the other hand, it has been distinctly held that, if the officer whose acts are complained of keeps within his powers, his motives, however corrupt and malicious they may be, may not be made a reason for holding him liable for the damages caused by his acts.'

In *Kendall v. Stokes*, 3 How. 87, Chief Justice Taney, speaking for the Supreme Court of the United States, said:

'A public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion; even although an individual may suffer by his mistake. A contrary principle would, indeed, be pregnant with the greatest mischiefs.'

In *Spalding v. Vilas*, 161 U.S. 483, Justice Harlan, speaking for the United States Supreme Court, in a case where damages were sought in an action against the Postmaster General, claimed to have resulted from his official action, said:

"In exercising the functions of his office, the head of an executive department, keeping within the limits of his authority, should not be under

an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as intrusted to the executive branch of the government, if he were subjected to any such restraint. He may have legal authority to act, but he may have such large discretion in the premises that it will not always be his absolute duty to exercise the authority with which he is invested. But if he acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals. In the present case, as we have found, the defendant, in issuing the circular in question, did not exceed his authority, nor pass the line of his duty, as Postmaster General. *The motive that impelled him to do that of which the plaintiff complains is, therefore, wholly immaterial. If we were to hold that the demurrer admitted, for the purpose of the trial, that the defendant acted maliciously, that could not change the law*'." (Italics ours).

The quotations contained in the decision in the Littlejohn case from *Kendall v. Stokes*, 3 How. 87; *Spalding v. Vilas*, 161 U.S. 483, are still the federal law. The Supreme Court of the United States followed the principles laid down in the Kendall and Spalding cases in the case of *Yaselli v. Goff*, 275, U.S. 503. For other federal cases holding steadfastly to the principles of these cases see *Gregoire v. Biddle*, 177 F. (2d) 579, which contains a general review of

the federal cases on this subject; *Lang v. Wood*, 92 F. (2d) 211; *Smith v. O'Brien*, 88 F. (2d) 769; *Standard Nut Margarine Company v. Mellon*, 72 Fed. (2d) 557; *Brown v. Rudolph*, 25 F. (2d) 504; and *Mellon v. Brewer*, 18 F. (2d) 168.

Argument On Specification of Error No. 5

SUMMARY

The relationship of private detective and client is not as sacred as the relationship of attorney and client. The courts have consistently held that an attorney is not privileged to withhold the name of his client. Therefore, the trial judge was in error in ruling that the wife of a private detective was privileged not to reveal the name of one of her husband's former clients.

ARGUMENT

It is the defendant's contention that the trial judge erred in allowing Mrs. Hambleton to claim the privilege of not revealing the name of one of her husband's former clients when asked so to do upon cross-examination. Mr. Hambleton was a private detective. Mrs. Hambleton testified on pages 52 and 53 of the transcript that she received a telephone call from a former client of Mr. Hambleton and that the former client advised her that she had told Mr. An-

derson about Mrs. Hambleton's operation. This evidence goes to the proof of maliciousness on the part of Agent Anderson. It was the plaintiffs' contention that Anderson knew Mrs. Hambleton was recovering from a serious operation and that by reason of such knowledge he should have acted differently than the plaintiff contends he did. It was the defendant's contention that Anderson knew nothing of the operation until he discovered it during the interview. Mrs. Hambleton's testimony as to what a former client of her husband told her on the telephone is highly prejudicial to the Government's defense of this action. The Government was prepared to prove that the person who called Mrs. Hambleton did not make any such statement. However, unless Mrs. Hambleton revealed the name of the individual who made the telephone call, such evidence would prove nothing. Therefore, it was highly important to the Government's case that Mrs. Hambleton reveal from whom she received this telephone call.

The trial judge upon his own volition and later upon request of plaintiffs' counsel allowed Mrs. Hambleton the privilege of not revealing the name of her husband's former client.

It should here be pointed out that the fact that the person calling Mrs. Hambleton had been a former

client of Mr. Hambleton had absolutely no bearing on the case.

Private detectives have no status whatever under the laws of the State of Washington. There are no statutory provisions for their qualifications or licenses. The privilege communication provisions of the statute of the State of Washington, Remington's Revised Statutes 1214, make no mention of anything about private detectives.

Although a thorough search has been made, the appellant has been unable to find any authorities dealing with any privilege communication between private detectives and their clients. However, numerous cases were found where courts have considered whether or not an attorney can be compelled to reveal the names of his clients. The defendant contends that the relationship of attorney and client is of a much higher order than the relationship of a private detective and client and therefore if an attorney is not privileged to withhold the name of his client, then, certainly a private detective cannot claim such privilege. All of the authorities steadfastly hold that an attorney does not have such privilege.

Syllabus 1 and 2 in *Behrens v. Hironimus.* 170 F. (2d) 627, states as follows:

"The 'privilege' as to communication between attorney and client pertains to the subject matter, and not to the fact of employment as attorney."

"Ordinarily, identity of attorney's client, or name of real party in interest, and terms of the employment, will not be considered as 'privileged communication'."

Syllabus 3 in *Goddard v. United States*, 131 F. (2d) 220 is quoted as follows:

"The 'privilege' as to communication between attorney and client extends only to communications made in attorney-client relationship, and not to fact that such a relationship exists."

The first syllabus in *Stanley v. Stanley*, 27 Wash. 570, is quoted as follows:

"The rule making communications between attorney and client privileged from disclosure on the witness stand does not apply to testimony by the attorney disclosing by whom he was employed in the management of a case."

The 4th syllabus in *Collins v. Hoffman*, 62 Wash. 278, is quoted as follows:

"An attorney is not privileged from disclosing by whom he was employed nor the terms of the employment."

CONCLUSION

The law of the State of Washington does not recognize and allow recovery for torts where there has been mental suffering without any invasion of the

plaintiff's person or property. The plaintiff's right to recover in this case being founded upon the Federal Tort Claims Act which allows recovery only if recovery can be had under the laws of the state where the act occurred is thus barred in this case. Since it is impossible for medical science to determine what causes a person to go insane, the court erred in finding that the plaintiff suffered her mental collapse by reason of Agent Anderson's acts. The Federal Tort Claims Act specifically excludes any possible theory upon which the plaintiff might otherwise have an action upon which recovery could be allowed. There is no possible basis upon which the court could allow privilege with regard to revealing the name of a private detective's former client.

Having fully shown to this Honorable Court the reversible errors committed by the trial judge, it is respectfully requested that this court reverse the decision of the trial judge and direct that judgment be entered for the defendant, United States of America.

Respectfully submitted,

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